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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 171.

J. A. SIMPSON,
Petitioner,

vs.

THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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J. A. SIMPSON,
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THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

The petitioner, J. A. Simpson, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Missouri, entered in the above-entitled cause on March 10, 1958.

OPINIONS.

The principal opinion of the Supreme Court of Missouri, *en banc*, Appendix A, *infra*, and the *Per Curiam* opinion on overruling Respondent's (this petitioner's) motion for rehearing or for clarification and modification Appendix B, *infra*, have been reported together in *Simpson* v. *Kansas City Connecting Railroad Company*, Mo. Sup., 312 S.W.2d 113.

JURISDICTION.

The opinion and judgment of the Supreme Court of Missouri, *en banc*, were entered on March 10, 1958; a motion for rehearing in that Court, or in the alternative for modification and clarification of the opinion were overruled on April 14, 1958.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED.

The Kansas City Connecting Railroad admittedly is engaged in interstate commerce, transporting livestock and feed to and from other railroads to the stockyards in the Kansas City Terminal area; petitioner was a locomotive engineer in charge of defendant's steam locomotive at the time of the accident involved and the question is whether such locomotive was at the time of the accident in "use" or in "service" on defendant's "line" within the meaning of the Boiler Inspection Act, 45 U.S.C.A., Section 23, so as to make The Boiler Inspection Act applicable.

Except for its approximately eight-mile connecting line and switch tracks, this railroad operates over the tracks

of other railroads and has but a single locomotive, the one involved in this suit. It has no roundhouse or yard facilities for repairing the engine and so entered into a verbal agreement under which the Union Pacific Railroad repaired the engine from time to time with Union Pacific crews in its yards and roundhouse in Kansas City, Kansas. Steam had been leaking from around the injector and boiler check valve for some time and on December 23, 1950, petitioner and his crew took the steam engine to the Union Pacific yards for repairs. Petitioner spotted the engine on track number one at the customary place beside the oil house and went to the engine dispatcher's office where he signed a "locomotive inspection report" detailing nine items for repairs including repairs to "boiler check" and "overflow pipe on left injector" and left the engine to be repaired. A Christmas week end intervened and on Tuesday December 26, 1950, petitioner and his crew went to the Union Pacific engine dispatcher's office to obtain the engine. When they got to the train dispatcher's office petitioner saw the engine parked in the usual place and was told by the boss in that office that the engine was ready. Petitioner signed the register with his name, the engine number, the date and the time he was taking the engine out and walked over to the engine. The engine was spotted on the west side of the oil house on No. 1 track, "the outbound rail" headed south away from the roundhouse and in the direction petitioner would take the engine to begin its regular switching work. Petitioner inspected the engine from the ground then got on the engine and looked at the gauges and they appeared to be all right. Petitioner then started the engine forward and had proceeded two or three engine lengths when blinding steam came from the fireman's side and petitioner stopped the engine; he then backed the engine up and spotted it close to the engine dispatcher's office. After he got down from the engine he saw steam

escaping from either the injector or the boiler check valve. He climbed upon the front end of the engine toward the running board and before he reached the running board there was a big burst of steam came out and hit him in the face causing him to loosen his hold and fall off backwards six feet to the ground and suffer serious and permanent injuries. It was part of petitioner's duties to inspect what appeared to be something wrong with the engine and if he had not fallen and been injured he would have filled out another locomotive inspection report and left it with the Union Pacific engine inspector.

The trial Court directed a verdict for respondent (defendant) on the issues under the Boiler Inspection Act and denied petitioner's motion for a new trial on such issue but granted a new trial and ordered re-instatement of the pleadings as to issues under the Federal Employers' Liability Act and respondent appealed; in Division the Supreme Court of Missouri reversed the trial court in holding no submissible case was made under the Boiler Inspection Act and affirmed the trial court in granting a new trial as to the issues under the Federal Employers' Liability Act (The majority and dissenting opinions in division are set out in Appendix C); upon dissent of one judge only on the issue whether the engine was in "use" under BIA, the case was transferred to the Court, *en banc,* where the opinion herein complained of was rendered refusing to pass on the issues under the Boiler Inspection Act for the stated reasons that it was not necessary to the decision and because the Court was unanimously of the opinion that the trial court was right in directing a verdict for defendant on the issues under the Boiler Inspection Act, and had unanimously voted against adopting the divisional opinion on that issue (Appendix C, *infra*).

The divisional opinion in this case by two judges and three commissioners, held that the trial court erred in sustaining a demurrer to plaintiff's evidence under BIA. It was on the BIA "use" issue that the case was transferred to the state court *en banc* and there briefed and argued by the parties on the basis that that issue was before that court. Now, if this Court fails to rule on the pending question under BIA, plaintiff will be confronted with a second trial limited to the portion of his case under FELA. Without correction of the trial court's ruling regarding BIA, the trial court will adhere to that ruling and will permit submission to the jury only on FELA. In order to be permitted to obtain a jury verdict upon his whole case, under both Acts, plaintiff would be compelled to undergo a second appeal from a final judgment on all issues—both FELA and BIA—to undergo a third trial, and likely a third appeal. This, clearly, would not serve the ends of justice.

The question thus presented is whether petitioner was entitled to have the issue of whether the engine at the time of the accident was in "use" "on its line" passed upon by a jury so as to bring the case within the provisions of the Boiler Inspection Act.

STATUTES INVOLVED.

The pertinent provisions of the Boiler Inspection Act, 45 U.S.C.A., Section 23, are printed in Appendix D, *infra*.

STATEMENT OF FACTS.

(References designated "Tr." are to the typewritten transcript of the record on appeal filed in the Supreme Court of Missouri, one copy of which is filed herewith.)

The Federal question involved in the instant case is the interpretation of the Federal Boiler Inspection Act (45 U.S. Code, Sec. 23) which was first raised by the petitioner upon the filing of his petition in the Circuit Court of Jackson County, Missouri (Tr. 1-4), alleging that while he and the railroad were engaged in interstate commerce he suffered injuries as a result of defendant's violation of the Boiler Inspection Act and also as a result of defendant's negligence under the Federal Employers' Liability Act (Tr. 1-4). At the beginning of the trial petitioner dismissed the allegations of his petition under the Federal Employers' Liability Act and proceeded to trial only on violation of the Boiler Inspection Act (Tr. 8, 9). At the close of petitioner's evidence respondent moved for a directed verdict which the Court gave (Tr. 88-90). Petitioner then filed a motion for a new trial in whole or in part—for a new trial on the issues under both the Boiler Inspection Act and the Federal Employers' Liability Act or a new trial on the issues under the Federal Employers' Liability Act only and the Court on April 17, 1956, sustained the latter, denying a new trial under the Boiler Inspection Act but granting a new trial on the issues under the Federal Employers' Liability Act (Tr. 91-94, 110-111). Respondent then filed its notice of appeal on April 24, 1956, and appealed to the Supreme Court of Missouri where a Division of that Court handed down an opinion affirming the order granting a new trial under the Federal Employers' Liability Act and reversing the order denying a new trial under the Boiler Inspection Act and remanding the cause for trial under both acts; the case was then transferred from Division to the Court, *en banc*, which rendered the present opinion on March 10, 1958, Appendix A, affirming as to the new trial under the Federal Employers' Liability Act and refusing to rule directly on the issues under the Boiler Inspection Act on grounds it was unnecessary to the decision. Petitioner filed a Motion for

rehearing or in the alternative for modification or clarification which the Court on April 14, 1958, overruled and denied in a *per curiam* opinion (Appendix B), thereby refusing to review rights of petitioner under the Boiler Inspection Act. In so doing, the court ruled that the court was unanimously of the opinion that the divisional opinion was wrong and that the trial court ruled correctly in directing a verdict for defendant under the Boiler Inspection Act.

As the case now stands in the state court petitioner will have to go back to the trial court and try the case solely under the Federal Employers' Liability Act. It is doubtful under Missouri practice whether he can on any subsequent appeal obtain a review of his right to have the issues under the Boiler Inspection Act submitted to a jury, but even if he can it is obviously an inadequate and abortive remedy in that he will not be permitted on the new trial now ordered to offer any additional evidence on the issues under the Boiler Inspection Act and will have to appeal, if at all, on the same record the Supreme Court of Missouri has found to be insufficient to entitle him to go to the jury. In ruling that a similar question in a case arising in Missouri was subject to review in this court, this court in the case of *Urie* v. *Thompson*, 337 U.S. 163, 172, 69 S. Ct. 1018, the court said (l.c. 34):

> "Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review. (citing cases)."

The opinion of the Missouri Supreme Court herein deprives petitioner of the right to have the issues under the Boiler Inspection Act reviewed and his right to have them submitted to a jury determined, when said issues are in-

separably intertwined with the issues under FELA and a proper and complete determination of the appeal cannot be made without considering said issues.

In accordance with a verbal agreement between defendant railroad and the Union Pacific Railroad petitioner on December 23, 1950, took the engine to the Union Pacific yards for repairs because of an excessive leakage of steam (Tr. 14, 51, 52, 53, 15, 16, 37, 39, 48). A Christmas week end intervened and on Tuesday, December 26, 1950, plaintiff and his crew went for the engine (Tr. 16, 17, 39, 40, 43).

When plaintiff went back to the Union Pacific roundhouse for the engine, after having previously left it there for repairs, he found it parked at the usual and customary place for return after repairs (Tr. 17, 18, 19, 38, 45). He then went to the dispatcher's office (Tr. 17, 18, 19, 38, 45) where the roundhouse boss told plaintiff the engine was ready for service (Tr. 41). Plaintiff then signed the engine register giving the time he was taking the engine out (Tr. 17, 18, 41, 42). Plaintiff and his crew then took possession of the engine and put it in motion away from the repair shops toward the place it would haul freight (Tr. 17, 40, 42). When the engine began leaking steam even worse than before plaintiff backed the engine up to the place for delivery to the Union Pacific for repairs (Tr. 51, 19, 20, 44). In returning the engine for repairs it was necessary for plaintiff to inspect the engine to determine what repairs were needed, to file a written report with the Union Pacific specifying the repairs to be made (Tr. 24, 25, 46, 16) and then sign the engine register (Tr. 19, 18, 41, 42). Plaintiff climbed up on the engine to make an inspection to enable him to make a report specifying the repairs to be made when the burst of steam struck him in the face and caused him to fall and be injured (Tr. 24, 45, 46, 19, 23, 25,

26, 44, 55, 56, 57, 63, 64). Plaintiff was still in possession of the engine in process of making the inspection and had not yet filed a written report specifying the repairs to be made and turning the engine back to the Union Pacific when the accident occurred (Tr. 44, 46). The engine was not at a place where the repairs were to be made but would be moved by the Union Pacific Hostlers from that point to the roundhouse where the repairs were to be made (the repairs could not be made outside), and after repairs would return it to the re-delivery point (Tr. 5, 45). The engine in question at the time was on the Union Pacific tracks under an agreement between defendant and the Union Pacific Railroad (Tr. 80, 82).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Supreme Court of Missouri Erred in Holding That There Was Not Sufficient Evidence to Take to the Jury the Question of Whether the Engine in Question Was in Use on Respondent's Line Within the Meaning of the Boiler Inspection Act (45 U.S.C.A. 23) at the Time of the Accident Here Involved.

The engine in question at the time was on the Union Pacific tracks under an agreement between Appellant employer and the Union Pacific Railroad (Tr. 80-82). The Union Pacific track at said time and place under the circumstances was the Appellant's "line" within the meaning of the statute.

In the case of *Hood* v. *Baltimore & O. R. Co.*, 302 Mo. 609, 259 S.W. 471, the Court in ruling a similar situation under the Federal Safety Appliance Act, said (l.c. 475):

"It is contended by respondent that the evidence adduced at the trial was insufficient to show that plaintiff was injured on defendant's line as contemplated in the federal statutes heretofore mentioned.

The evidence clearly shows that the train in controversy, including the mail car with the unworkable coupler, belonged to defendant. The plaintiff was at the time of his injury, and prior thereto, a car inspector in the service of defendant. The latter was selling passenger tickets from St. Louis, Missouri, to points outside the state, and was likewise receiving and transporting freight and express business in the same manner. Aside from the actual movement of the train in controversy by the engine and train crew of the Terminal road, it was operated by its own conductor, porter and brakeman, as it would have been had the respondent owned the road from St. Louis, Missouri, to its western terminus at East St. Louis. In the absence of evidence on the subject, it should be assumed that the Terminal Company, in making up the defendant's interstate train, and transporting the same to East St. Louis over the Terminal Road, with the engines and crew of the latter, was acting under some running arrangement with the defendant, or under an express or implied agreement between said railway companies. It was necessary that defendant in carrying on its interstate business between St. Louis, Missouri, and points outside the state, should do so through the agency of some other carrier, as it had no line of its own from St. Louis, Missouri, to the western terminus of its road. As the defendant and Terminal Company were acting in concert in making up defendant's train aforesaid, we are of the opinion that the Terminal Company, in performing said service, was the agent of defendant at the time and place of accident, and that plaintiff brought his case within the purview of the federal statutes heretofore mentioned, by substantial testimony which entitled him to go to the jury. Section 2 of Safety Appliance Act of March 2, 1893 (27 Statutes at Large, 531, c. 196), and as amended by

Act of March 2, 1903 (32 Statutes at Large, 943); Gray v. L. & N. Railroad Co., (D.C.) 197 Fed. 874; Philadelphia & R. Ry. Co. v. U. S., 191 Fed. 1, 111 C.C.A. 661.

We are of the opinion that the principles of law announced in the two cases just cited apply with equal force to the facts in the present controversy.

After a very careful consideration of both the law and facts in this case, we have reached the conclusion that plaintiff produced substantial testimony at the trial of the case which entitled him to go to the jury on the merits of the controversy.

The judgment below is accordingly reversed, and the cause remanded, to be proceeded with in conformity to the views heretofore expressed."

We have checked the citator and find that case has never been overruled, modified or even questioned.

In *Philadelphia and Reading Railway Company* v. *United States*, 3rd Cir., 1911, 191 Fed. 1, the defendant operated a car with a defective grabiron on a track owned by another company and contended this operation was not "on its line." The train of which the car was a part was about to proceed toward defendant's tracks, and had actually started on its passage in the direction named. It was the custom for defendant's trains to pass over tracks of the other company in a continuous movement in the conduct of interstate traffic. The court affirmed the judgment in favor of the United States for penalties, and held (191 Fed. 4) that the car was in use on defendant's line, saying it (l.c. 4):

"* * * was in lawful use of these tracks for the conduct of its interstate traffic, under a contract with the corporation owning the same. * * * that the defendant company had a legal right to the use of these tracks, and that during such use they were properly

> the line of the defendant company within the meaning of the 'Safety Appliance Act.' * * * The fact, if it be a fact, that in this case the inspection of the cars was made by the servant of the New Jersey Central Road, cannot relieve the defendant from the liability imposed by the Act. It cannot by contract dispense with any care required of it by law, and the most that could be said of such a situation would be that it had voluntarily made the inspectors of the other company its own."

In *Gray v. L. & N. Railroad Company*, District Ct., Tennessee, 1912, 197 Fed. 874, 876, a switchman sued his employer under the Safety Appliance Acts for injuries suffered when a car with a defective coupler was used to deliver a shipment on a private switch track owned by an industry. In that case the court held that the term "its line" includes any track used by the defendant, and that the case of *Philadelphia and Reading Railway Company v. United States*, cited and quoted above, is "controlling" in actions by employees for damages against the employer under the Safety Appliance Acts.

In the instant case the answers by the respondent to the interrogatories show that it had a contract with the Union Pacific Railroad Company to repair the locomotive in question for a consideration (Tr. 81, 82). The evidence shows that in order for the locomotive so to be repaired, it was necessary for the locomotive to use the tracks where the injury occurred, and traverse tracks of the Union Pacific (Tr. 36, 37, 81, 82, 86, 87). Thus, the respondent had a right to use the track in question, to further its own business, and the track was the track or the line of the respondent within the meaning of the Safety Appliance Acts.

At the time of the injury the plaintiff had commenced operating the locomotive toward the defendant's own

tracks, and, in fact, was on the way to the performance of interstate switching activities for the defendant.

The Safety Appliance Acts (including the Boiler Inspection Act) apply to switch engines.

In *L. & N. R. Co.* v. *Botts*, 8 Cir., 1949, 173 F.2d 164, 167-168 (M. & S. 110), it was held that bolts on the footboard of a switch engine violated Sec. 23, BIA; that ICC rules are not all-inclusive; and that mere compliance with such rules does not excuse failure to keep the engine in a safe condition.

In *Bolan* v. *Lehigh Valley R. Co.*, 2 Cir., 167 F.2d 934, it was held that the pilot step of a switch engine was unsafe and in violation of Sec. 23 of BIA; on almost identical facts with *Botts*, *supra*.

In *Delevie* v. *Reading Company*, 176 F.2d 496, 497, the deceased fell over a power reverse gear mechanism installed horizontaliy above the metal foot walk of a switch engine. The court said that, "A locomotive engine, no single part of which is installed or maintained in violation of the Boiler Inspection Act, may still provide an unsafe place to work and so violate the act."

In the case of *United States* v. *New York Central Railroad Company*, United States District Court, New York, 70 F.Supp. 761, the New York Central Railroad had a contract with the Central Railroad to operate trains over tracks owned by the Central Railroad, and the contract provided that while that was being done the trains would be regarded as trains of the Central Railroad. While the New York Central was so operating it was found that one of the cars had a defective running board. The New York Central contended that this did not occur on its line and that the Safety Appliance Acts did not apply because it did not

own the track. The court held that the Safety Appliance Acts did apply and that the violation did occur on the line of the New York Central Railroad Company, and at 70 F.Supp. l.c. 703. (a) said:

> "An interpretation of the statute which would exonerate a carrier from liability where it has the actual physical control of the defective car on a line over which it may lawfully pass would detract from its effectiveness. Such interpretation is to be avoided."

The cases mentioned above were cited and followed by the United States Court of Appeals for the 8th Circuit in *Texas and Pacific Railway* v. *United States* 8 Cir., 189 F.2d 749, and at l.c. 752, the court said:

> "We have found no cases dealing with facts exactly like the facts in this case. Our conclusion, we think finds support in Philadelphia and R. R. R. Co. v. United States, 3 Cir., 191 Fed. 1, and United States v. New York Central R. R. Co., District Court Northern District N. Y., 70 F.Supp. 761. In both cases it is held that where one railroad under a valid agreement uses the tracks of another for the operation of its trains, the tracks of the second railroad while being used by the first are part of the first railroad lines within the meaning of the Safety Appliance Acts. And see also Gray v. L. & N. R. R. Co., District Court, Eastern District Tennessee, 197 Fed. 874, 876."

II.

The Supreme Court of Missouri Erred in Holding That There Was Not Sufficient Evidence to Take to the Jury the Question Whether the Engine in Question Was in "Use" Within the Meaning of the Boiler Inspection Act (45 U.S.C.A. 23) at the Time of the Accident Here Involved.

The Union Pacific had represented that it had completed repairs on the engine and had placed it on the de-

livery track for return to respondent (Tr. 17, 18, 19, 38, 41, 42, 45). Plaintiff and his crew had signed for the engine and taken possession of it (Tr. 17, 40, 41, 42) and were attempting to operate back to respondent's tracks to use in doing respondent's work (Tr. 19, 44).

We submit that at the time of the casualty the engine was in "use" on respondent's line. Prior to the injury, the engine had been returned to service. It was spotted in the usual place for engines returned to service (Tr. 17, 18, 19, 38, 45). The Union Pacific boss had informed plaintiff the engine was ready to go (Tr. 41, 42). The plaintiff had signed the engineer's register book taking over the engine (Tr. 17, 18, 41). The engine would be in service until it was taken out of service by the plaintiff-engineer turning the engine in by signing the engineer's register book and filing his locomotive inspection report with the engine dispatcher (Tr. 23, 24). Until that time the engine was in service and plaintiff was in charge of the engine (Tr. 53). At the very moment of injury, plaintiff was inspecting the said engine in order to ascertain whether the same should or should not be turned in and taken out of service (Tr. 19, 23, 25, 26, 44, 55, 56, 57, 63, 64). Under such circumstances, it was in use or being operated in the service of respondent within the meaning of the Boiler Inspection Act.

In the case of *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 58 S.Ct. 426, the facts were (l.c. 427):

> "Petitioner was employed by the Wabash Railway Company as a car inspector in its yard at Granite City, Illinois. He was injured in November, 1927, while inspecting a car which was one of a string of cars brought by the respondent, Terminal Railroad Association of St. Louis, from St. Louis to Granite City and placed upon a track of the Wabash known as a 'receiving' or 'inbound' track. The purpose of the inspection

was to determine whether the cars were to be accepted by the Wabash.

Both the Wabash and the Terminal Companies were carriers engaged in interstate commerce.

While making his inspection, petitioner stood upon one of the side ladders of the car, and in attempting to pull himself to the top of the car, petitioner took hold of a grabiron which, with the board to which it was attached, became loose, causing him to fall. The board was found to have 'become rotten from end to end on the under side, and to some extent on the upper side around the bolts by which the grabiron was attached to it.'

Petitioner first sued his employer, the Wabash, and under the provisions of the Federal Safety Appliance Act, but a judgment in his favor was reversed upon the ground that the car had not yet been accepted by the Wabash Company which therefore had not hauled or used it, or permitted it to be hauled or used, within the prohibition of the statute. Brady v. Wabash Railway Company, 329 Mo. 1123, 49 S.W.2d 24, 83 A.L.R. 655. While that suit was pending, petitioner brought the present suit against respondent."

In that case the Supreme Court of Missouri reversed a judgment for plaintiff.

In reversing the Supreme Court of Missouri and holding there was a submissible case against the Terminal Railroad this Court there said (58 S.Ct. l.c. 428):

"The first question is whether the car can be said to have been in use by the respondent at the time in question. The statute gives no ground for holding that it was the intent of Congress that in a situation such as is here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty. The 'use, movement or hauling of the defective car,' within the meaning of the statute, had not ended when

petitioner sustained his injuries. Chicago Great Western R. Co. v. Schendel, 267 U.S. 287, 291, 292, 45 S.Ct. 303, 304, 69 L.Ed. 614. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. It is not a case where a defective car has reached a place of repair. See Baltimore & Ohio R. Co. v. Hooven, 6 Cir., 297 Fed. 919, 921, 923; New York C. & St. L. R. Co. v. Kelly, 7 Cir., 70 F.2d 548, 551. The car in this instance had not been withdrawn from use. Johnson v. Southern Pacific Co., 196 U.S. 1, 21, 22, 25 S.Ct. 158, 49 L.Ed. 363; Delk v. St. Louis & San Francisco R. Co., 220 U.S. 580, 584, 586, 31 S.Ct. 617, 55 L.Ed. 590; Great Northern Railway Co. v. Otos, 239 U.S. 349, 351, 36 S.Ct. 124, 60 L.Ed. 322; Chicago Great Western R. Co. v. Schendel, supra. The car was still in use, though motionless. Minneapolis, St. Paul & Sault Ste. Marie Rwy. Co. v. Goneau, 269 U.S. 406, 409, 46 S.Ct. 129, 130, 70 L.Ed. 335. In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute.

The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. Southern Railway Company v. United States, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72. Laying down this comprehensive rule as a matter of public policy, Congress has made no exception of those employed in inspecting cars. The statute has been liberally construed 'so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act.' Swinson v. Chicago, St. P., M. & O. Rwy. Co., 294 U.S. 529, 531, 55 S.Ct. 517, 79 L.Ed. 1041, 96 A.L.R. 1136. In Davis v. Wolfe, 263 U.S. 239, 243, 44 S.Ct. 64, 66, 68 L.Ed. 284, reviewing the earlier cases, the Court held that one can recover 'if the failure to

comply with the requirements of the Act is a proximate cause of the accident resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.' Even where the required equipment is known to have become defective and the car is being hauled to the nearest available point for repairs, while the act relieves the carrier in such a case from the prescribed penalties, the carrier still remains subject by the express terms of the statute to civil liability for injuries sustained by 'any railroad employee' in the course of such a movement by reason of the defective equipment. Act of April 14, 1910, c. 160, Sec. 4, 36 Stat. 299, 45 U.S.C., Sec. 13, 45 U.S.C.A., Sec. 13. See New York, C. & St. L. R. Co. v. Kelly, supra.

We think that these considerations require the conclusion that one is not to be denied the benefit of the act because his work was that of inspection for the purpose of discovering defects. As we said in Louisville & Nashville R. Co. v. Layton, supra, the liability 'springs from its being made unlawful to use cars not equipped as required—not from the position the employee may be in, or the work which he may be doing at the moment when he is injured,' provided the defective equipment is the proximate cause of the injury.

The fact that petitioner was looking for defects of the sort which caused his injury does not prevent recovery as the statute expressly excludes the defense of assumption of risk. 45 U.S.C., Secs. 7, 54, 45 U.S.C.A., Secs. 7, 54."

In this case the engine was left only temporarily at the place where it stood at the time of the accident waiting to be moved to the place where it would be repaired and therefore was still in service.

In the case of *Lilly* v. *Grand Trunk Western R. Co.*, 317 U.S. 481, 63 S.Ct. 347, in holding the Boiler Inspection Act applicable the Court said (l.c. 351):

"The Act, like the Safety Appliance Act, 45 U.S.C.A., Sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. Cf. Great Northern R. Co. v. Donaldson, supra; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U.S. 281, 295, 296, 28 S.Ct. 616, 621, 52 L.Ed. 1061; Louisville & N. R. Co. v. Layton, 243 U.S. 617, 621, 37 S.Ct. 456, 457, 61 L.Ed. 931; Swinson v. Chicago, St. P., M. & O. R. Co., 294 U.S. 529, 531, 55 S.Ct. 517, 518, 79 L.Ed. 1041, 96 A.L.R. 1136."

Respondent construes the Act, 45 U.S.C.A. 23, to require that the equipment be "in the active service" of the railroad and "in the service to which the same are put." (App. Brief, pp. 12, 17, 35). In this we submit respondent is in error.

The statute (45 U.S.C.A. 23) provides that a carrier may not use or permit the use on its line of a locomotive not proper and safe to operate "in the service to which the same is put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, * * *."

We direct attention to the fact the statute merely lays down a test as to the condition the engine must be in to meet the requirements of the Act, it does not require that the engine be "in the active service" of the railroad at the time of the accident but only that it may not use or permit to be used any engine unless it is in such condition that it is safe to use "in the active service" of the railroad.

In the case of *Brady* v. *Terminal R. Ass'n*, 303 U.S. 10, 58 S. Ct. 426, the car on which plaintiff was injured was standing on the receiving track at the time and certainly was not then in "active service," yet the act was held to be applicable. Respondent has cited no federal case making such requirement, and we have found none.

CONCLUSION.

The Supreme Court of Missouri in holding petitioner's evidence not sufficient to take to the jury the question of whether the engine was in "use" on Respondent's "line" at the time of the accident has invaded the province of the jury and its opinion conclusively shows that it failed to follow the teachings of this court in the case of *Lavender* v. *Kurn*, 327 U.S. 645, 653, 66 S. Ct. 740, 744, and later cases following that decision holding that "whenever facts are in dispute or the evidence is such that fair-minded men might draw different inferences," the issues are for the jury even though thereafter "a measure of speculation is required." The ruling of the Supreme Court of Missouri is in conflict with the decision of this Court on similar facts in the case of *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 58 S. Ct. 426. Certiorari should be granted in this instance "to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 500, 77 S. Ct. 443. It is clear that "the proofs justify with reason the conclusion" that the engine was in use on defendant's line. *Rogers* v. *Missouri Pacific R. Co., supra.*

Respectfully submitted,

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